REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 796 OF 2002

(From original conviction and sentence in Criminal Case No. 5411 of 2001 of the Senior Principal Magistrate's Court at Thika)

EWOI ERUPE…… APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

J U D G E M E N T

The Appellant was tried and convicted of the offence of robbery contrary to Section 296 (1) of the Penal Code. The facts as gathered from the charge sheet were that on the 5th day of December, 2001 at 2 a. m. in Gitambaa village of Thika District within Central Province, being armed with dangerous weapons namely iron bars, pangas, simis robbed **MARY WAMBUI** of her T. V., Radio, Battery, Leather Jacket, 4 plates, 4 cups and cash worth 20,000/= all valued at Kshs.30,000/=.

The Appellant also faced an alternative count of handling stolen goods contrary to Section 322 (2) of the Penal Code inthat on 5. 12. 2001 in Ruiru, Gitambaa Village, Thika District Central Province otherwise than in the course of stealing dishonestly retained, Radio Battery, 4 cups, 4 plates, Tuitor the property of Mary Wambui knowing or having reason to believe them to be stolen goods. The Appellant was tried by the Senior Principal Magistrate's Court at Thika. Following a full trail in which the prosecution called 5 witnesses and the Appellant testified by giving a sworn statement and calling no witnesses, the trial Magistrate was persuaded by the evidence adduced by the prosecution against the Appellant and convicted him accordingly. The Appellant's co-accused was however acquitted for lack of sufficient evidence. The Appellant was then sentenced to a prison term of 7 years with 12 strokes of the cane.

It is against this conviction and sentence that the Appellant lodged this Appeal citing 4 grounds as can be gathered from the face of the petition of Appeal filed in this Court on 29th January, 2002. When the Appeal was called out for hearing, Miss Okumu, Learned State Counsel who appeared for the Respondent indicated to the Court that the Respondent was conceding to the Appeal. The Respondent had noted on perusal of the record that the case in the Lower Court was at some point prosecuted by one Police Constable Omulepu contrary to the provisions of Sections 85 (2) of the Criminal Procedure Code. The Learned State Counsel also drew the attention of this Court to the two decisions of the Court of Appeal on this issue i.e. ***CR. APPL. NO. 67 OF 2002 – ROY RICHARD ELIREMA & ANOR –VS-REPUBLIC and CR. APPL. NO. 142 OF 2002 – SILVESTER KELI KAKUMI –VSREPUBLIC.***

The holding in these decisions is that any trial conducted in the Court by a Prosecutor who is below the rank of an acting inspector is a nullity ***ab initio .*** However, as there was sufficient evidence on record to convict the Appellant of the offences preferred and being serious offences, the Learned State Counsel prayed that if I agreed with her and allowed the Appeal, I should order for a re-trial.

However, the Appellant though did not object to the Respondent's position, he was nonetheless opposed to the order for a re-trial. He submitted hat he had been in custody for a long time and that an order for a re-trial would in the circumstances be unfair.

I have perused the record and noted that indeed at some point in time during the trial in the Court below a Police Constable by the name of Omulepu undertook the prosecution of the case. This is contrary to the provisions of Section 85 (2) of the Criminal Procedure Code. As stated by the Court of Appeal in the aforesaid authorities, such trial is a nullity. Since I am bound by the decisions of our superior Court, I accordingly hold that the Appellant's trial in the Lower Court was a nullity. I consequently allow the Appeal quash the conviction and set aside the sentence.

I was invited by the Respondent to order a re-trial if I declared the initial trial a nullity. The Appellant as expected opposed such move. The Court of Appeal has not provided the guidance on how to proceed in the event of a Court holding such trial to be a nullity. In the Elirema case, the Court of Appeal ordered for the immediate release of the Appellants. However, in the latter case the same Court ordered a re-trial. A careful perusal of the said authorities seem to suggest that in considering whether or not to order a re-trial, each case must be decided on its own peculiar facts. However, the Court is enjoined to bear in mind when the offence occurred, the gravity of the offence, the jurisdiction of the Court and perhaps the nature of the sentence imposed and if it is imprisonment, the period so far served by the Appellant.

I note that the Appellant has been in custody since his arrest on 6. 12. 2001. He was sentenced to serve a jail term of 7 years together with 12 strokes of the cane although the latter has since been outlawed. Punishment for simple robbery is fourteen years. The offence is serious. I would in the premises order that the Appellant be re-arrested, charged and tried before another Court of competent jurisdiction with a competent prosecutor. The Appellant should appear before the Chief magistrate's Court at Thika for his plea to be taken on 23rd February, 2004.

Dated at Nairobi this 16th day of February, 2004.

M. S. A. MAKHANDIA

JUDGE